In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 102

ANDJA KOLOVRAT, DRAGO STOJIC, DRAGICA SUNJIC, NEDA TURK, JOSIP BULGAN, JURE VIVANOVIC, MARA TOLIC and MILAN STOJIC, and also BRANKO KARADZOLE, Consul General of Yugoslavia at San Francisco, California, Petitioners

v.

STATE OF OREGON, acting by and through the State Land Board, Respondent.

LUTVO ZEKIC, IBRO ZEKIC, HABIBA TURKOVIC, DZEDJA POPOVAC, SEFKO MURADBASIC, DIKA MURADBASIC, MURTA BRKIC, MILKA ZEKIC, JASMINA ZEKIC and RAJKA ZEKIC, and BRANKO KARADZOLE, Consul General of Yugoslavia at San Francisco, California, Petitioners

v.

STATE OF OREGON, acting by and through the State Land Board, Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether or not Article II of the Treaty of Commerce between the United States of America and Serbia of 1881, 22 Stat. 963 (R. 55, App. B, infra) covers succes-

sion by Yugoslavian nationals to property of American citizens dying and leaving property in the United States.

2. Whether or not the International Monetary Fund Agreement, 60 Stat. 1401, T.I.A.S. 1501 (R. 57), constitutes an overriding Federal policy forbidding Oregon from giving effect to its statute making the right of nonresident aliens to succeed to property from Oregon estates dependent upon the right of American heirs to take and receive payment of their foreign inheritances and legacies.

STATEMENT

Joe Stoich and Muharem Zekich died intestate in Oregon in December 1953 leaving estates of personal property. They were residents of Oregon and their United States citizenship is not questioned. Their sole surviving relatives were residents and nationals of Yugoslavia, who, together with Karadzole, the Consul General of Yugoslavia at San Francisco, California, their attorney in fact, are the petitioners. There being no other relatives of the decedents legally qualified to inherit, the State of Oregon filed petitions in the Circuit Court of the State of Oregon for Multnomah County for the escheat of the estates under the provisions of ORS 111.070. This statute conditions the right of nonresident aliens to inherit from Oregon decedent's estates upon the right of American heirs to take and receive payment in the United States of their inheritances or legacies

originating from the estates of decedents in the foreign country." (App. A)

The petitioners answered the State's petition for escheat by asserting that the rights required by ORS 111.070 existed between the United States and Yugoslavia and denying that the estates had escheated. No mention was made in either of the answers, as to the Treaty of Commerce and Navigation of 1881 with Serbia or of the International Monetary Fund Agreement (R 3,7).

The trial court held in favor of the petitioners and against the State of Oregon and entered its Order *including* findings prepared by petitioners on direction of the court. Again, no reference was contained in the Order or findings concerning the Treaty or the Monetary Fund Agreement (R 76, 79).

Because the basic facts and questions were substantially the same, the cases were consolidated, both in the trial court and on appeal. In determining this appeal, the Oregon Supreme Court addressed itself only to the question of the second right required by the Oregon statute as to whether there was a certain and enforceable right vested in American citizens to receive pay-

Section 111.070 (1), Oregon Revised Statutes, R. 83-84, App. A., infra, p. 34, pertinent here, reads:

"(1) The right of an alien not residing within the United States or its territories to take either real or personal property or the proceeds thereof in this state by succession or testamentary disposition, upon the same terms and conditions as inhabitants and citizens of the United States, is dependent in each case:

"(a) Upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property and the proceeds thereof upon the same terms and conditions as inhabitants and citizens of the country of which such alien is an inhabitant or citizen;

"(b) Upon the rights of citizens of the United States to receive by payment to them within the United States or its territories money originating from the estates of persons dying within such foreign country; * * *"

ment in this country of the proceeds of their Yugoslavian inheritances (R. 86).

The Oregon Supreme Court reversed the trial court and held that petitioners had failed to meet the requirements of ORS 111.070 in that (1) the Yugoslavian foreign exchange laws and regulations (R. 87, 92) failed to give American heirs and legatees an unqualified legally enforceable right to receive payment of their Yugoslavian inheritances and legacies (R. 93-94); (2) that language in Article II of the Treaty of Commerce of 1881 with Serbia had the same import and meaning as language in Article IV of the German Treaty of 1923 (44 Stat. 2132) and did not cover nationals residing in their home countries with respect to testate or intestate succession of their property by nationals in the other country, the construction of the treaty being governed by Clark v. Allen, 331 U.S. 503, 91 L. Ed. 1633, 67 S. Ct. 1431 (R. 100); and (3) that the Bretton Woods Agreement (International Monetary Fund Agreement) in its terms recognized that countries may impose monetary restrictions such as the Yugoslavian foreign exchange laws but that the agreement did not support petitioners' thesis (R. 103).

It is not clear from petitioners' brief in the Oregon Supreme Court case, pp. 72-74, what legal significance they then attached to the International Monetary Fund Agreement or what specifically was their thesis (R. 102-103). Petitioners' thesis concerning the overriding effect of the International Monetary Fund Agreement is apparently a development in these proceedings for certiorari.

Realizing that the construction of a treaty is a matter for the courts rather than a political question, and having before it the construction of Article IV of the German Treaty of 1923 in Clark v. Allen, supra (331 U.S. 503, 515-516), as well as the construction of similar treaty language in the earlier cases cited in the Clark case, the Oregon Supreme Court properly held that Article II of the Serbian Treaty did not apply in the case of citizens of the United States residing in the United States with regard to the testate or intestate succession to their property by the nationals of the other country.

The construction of treaties being a matter of judicial determination by this Court and the construction of a similar applicable treaty provision having been made by the United States Supreme Court, such construction was binding, not only upon the Oregon court, but also upon the executive and legislative branches of the states and the United States. Being bound by this Court's construction of treaty language of identical meaning in the Clark case, the Oregon court was necessarily required to reject or disregard a construction at variance or in conflict with the construction of the United States Supreme Court.

Petitioners attempt to weaken the adherence of the Oregon Supreme Court to this Court's construction of the German treaty in Clark v. Allen, supra (331 U.S. 503), by charging that the Oregon court "misconceived" and "misread" the treaty provision and the decision in

the Clark case, that it arrived at a "mistaken" belief as to the decision in the case, and that the language quoted and summarized by the Oregon court from the Clark case "completely preverted" the treaty provisions and "plainly misstated" the holding of the Clark case (Pet. Br. 7-8).

The provisions of Article IV of the German Treaty of 1923 (44 Stat. 2132) as to personalty, considered in Clark v. Allen, supra (331 U.S. 503), and Article II of the Serbian Treaty of Commerce of 1881 (22 Stat. 963) were quoted in full in the opinion of the Oregon Supreme Court. In re Stoich's Estate, —— Or. ——, 349 P. (2d) 255, 263, 265 (R. 95, 98).

The unanimous opinion of this Court in Clark v. Allen, supra (331 U.S. 503), was written by Mr. Justice Douglas. We quote from the Clark opinion relating to the treaty as follows (331 U. S. 503, 514-516):

> "*Third.* The problem of the personalty raises distinct questions. Article IV of the treaty contains the following provision pertaining to it:
>
> " 'Nationals of either High Contracting Party may have full power to dispose of their personal property of every kind within the territories of the other, by testament, donation, or otherwise, and their heirs, legatees and donees, of whatsoever nationality, whether resident or non-resident, shall succeed to such personal property, and may take possession thereof, either by themselves or by others acting for them, and retain or dispose of the same at their pleasure subject to the payment of such charges only as the nationals of the High Contracting Party within whose territories such property may be or belong shall be liable to pay in like cases.'

"A practically identical provision of the Treaty of [April 10] 1844 with Wurttemberg, Art. III, 8 Stat 588, 590, was before the Court in Frederickson v. Louisiana, 23 How (US) 445, 16 L ed 577. In that case the testator was a citizen of the United States, his legatees being citizens and residents of Wurttemberg. Louisiana, where the testator was domiciled, levied a succession tax of 10 per cent on legatees not domiciled in the United States. The Court held that the treaty did not cover the 'case of a citizen or subject of the respective countries residing at home, and disposing of property there in favor of a citizen or subject of the other . . .' pp 447, 448. That decision was made in 1860. In 1917 the Court followed it in cases involving three other treaties. Petersen v. Iowa, 245 US 170, 62 L ed 225, 38 S Ct 109; Duus v. Brown, 245 US 176, 62 L ed 228, 38 S Ct 111; Skarderud v. Tax Commission, 245 US 633, 62 L ed 522, 38 S Ct 133.

"The construction adopted by those cases is, to say the least, permissible when the syntax of the sentences dealing with realty and personalty is considered. So far as realty is concerned, the testator includes 'any person'; and the property covered is that within the territory of either of the high contracting parties. In case of personalty, the provision governs the right of 'nationals' of either contracting party to dispose of their property within the territory of the 'other' contracting party; and it is 'such personal property' that the 'heirs, legatees and donees' are entitled to take.

* * *

"We accordingly hold that Article IV of the treaty does not cover personalty located in this country and which an American citizen undertakes to leave to German nationals. * * *"

For the purposes of comparison and to dispel any doubt as to the correctness of the Oregon court's quota-

tions and summary of the language in the Clark case, we likewise quote from the opinion of the Oregon court concerning the treaty provisions (R. 96-99):

"*Clark v. Allen,* supra, decided June 9, 1947, becomes a holding of prime interest in this matter in that it was precipitated by a proceeding initiated under § 259, California Probate Code as it was in 1942. It will be remembered that section bears upon the rights of aliens not residing in the United States to take real or personal property in the state of California. And for the further reason that it construes a treaty provision similar to Article II of the Treaty of 1881.

"In the Clark case, Alvina Wagner, a resident of California, died in 1942. She left real and personal property situate in that state. By a will, dated December 23, 1941, she bequeathed her entire estate to four relatives who were nationals and residents of Germany. Six heirs at law, who were residents of California, filed a petition for determination of heirship in the probate proceeding, claiming that the German nationals were ineligible as legatees under § 259, supra, of the California Probate Code. It appears that at the time of the decision in Clark, there had never been a hearing on that petition. This, for the reason that in 1943 the Alien Property Custodian vested in himself all right, title and interest of the German nationals in Mrs. Wagner's estate. The Property Custodian thereupon in- [fol. 148] stituted an action in the U.S. District Court against the executor under the will and the California heirs at law for a determination that the California heirs had no interest in the estate and that he was entitled to the entire net estate upon the conclusion of the administration. The District Court granted judgment for the Custodian on the pleadings (52 F Sup 850). The Circuit Court of Appeals reversed, holding that the District Court was without jurisdiction of the subject

matter (147 F2d 136). The case went thence to the Supreme Court on certiorari where it was held that the District Court had jurisdiction of the suit and remanded the cause to the Circuit Court of Appeals (9th CC) for consideration on the merits (326 US 490). The Circuit Court of Appeals thereafter held for the California heirs (156 F2d 653). The case was returned again to the Supreme Court on a petition for a writ of certiorari which was granted on the ground that the issues raised were of national importance.

"The defendants concede that the Clark case over the years has, since its pronouncement in 1947, come to be regarded as 'the cornerstone of the entire reciprocal inheritance rights structure as it was the first major decision by a court of last resort on the California reciprocity statute.'

"In *Clark v. Allen*, supra, the court was called upon to construe Article IV of the Treaty of Friendship, Commerce and Consular Rights made with Germany December 8, 1923 (44 Stat 2132). It had different provisions relating to the testamentary disposition of realty and personalty. Article IV of the Treaty, which is the provision of our interest, contained the following provisions as to the disposition of personalty:

> " 'Nationals of either High Contracting Party may [fol. 149] have full power to dispose of their personal property of every kind *within the territories of the other*, by testament, donation, or otherwise, and their heirs, legatees and donees, of whatsoever nationality, whether resident or non-resident, shall succeed to such personal property, and may take possession thereof, either by themselves or by others acting for them, and retain or dispose of the same at their pleasure subject to the payment of such duties or charges only as the *nationals of the High Contracting Party within whose territories* such property may

be or belong shall be liable to pay in like cases.' (Emphasis ours.) (91 L ed at 1644)

"We are of the opinion that the following words and phrases found in the German Treaty of 1923: 'Nationals of either High Contracting Party * * * within the territories of the other' are of the same import and meaning as the words and phrases found in Article II of the Treaty of 1881; that is, 'citizens of the United States in Serbia and Serbian subjects in the United States,' a phrasing which the defendants ascribe to Victorian English.

"In the Clark case, it was held that the language of Article IV of the German Treaty applied only to nationals of either of the party nations who were *within* the territory of the other. Mr. Justice Douglas speaking for the court, says at p 1664 L ed:

"'* * * In case of personalty, the provision governs the right of "nationals" of either contracting party to dispose of their property within the territory of the "other" contracting party; and it is "such personal property" that the "heirs, legatees and donees" are entitled to take.

"'Petitioner, however, presents a detailed account of the history of the clause which was not before the Court in Frederickson v. Louisiana, 23 How (US) 445, 16 L ed 577, supra, and which bears out the construction [fol. 150] that it grants the foreign heir the right to succeed to his inheritance or the proceeds thereof. But we do not stop to review that history. For the consistent judicial construction of the language since 1860 has given it a character which the treaty-making agencies have not seen fit to alter. And that construction is entirely consistent with the plain language of the treaty. We therefore do not deem it appropriate to change that construction at this late date, even though as an original matter the other view might have much to commend it.

> " 'We accordingly hold that Article IV of the treaty does not cover personalty located in this country and which an American citizen undertakes to leave to German nationals. * * *' "

The Oregon court then referred to the case of In re Arbulich's Estate, 41 Cal. (2d) 86, 257 P. (2d) 433, in which the California court applied the United States Supreme Court's interpretation in the Clark case to the construction of Article II of the Serbian Treaty (R. 99-100). The Oregon Supreme Court then went on to say (R. 100):

> "If we correctly appraise the position of defendants, they would, notwithstanding the doctrine of *Clark v. Allen*, supra, have us interpret the words 'in Serbia' and 'in the United States,' as they appear in Article II of the Treaty of 1881, as referring to the place where property rights are granted rather than to the geographical location of the person claiming them. If thus construed the provision would accord to the nationals of either party wherever resident rights similar to those enjoyed by nationals of the most favored nation wherever resident. But this we decline to do, being impressed that the construction given to the German Treaty in the Clark case applies with equal force to the Serbian Treaty of 1881, and as also held in Arbulich's Estate."

Error has been suggested as to the factual determination concerning receipt of payment by American heirs of their Yugoslavian inheritances (Pet. Br. 11-14). It is our understanding, however, that findings and determinations of fact by the state courts are conclusive and are not re-examined by the United States Supreme Court. We have therefore not undertaken a review and analysis

of the evidence, a review of which will be found in the Oregon Supreme Court briefs. The testimony and exhibits are in the case file transmitted to the Clerk of this Court. The factual situation in relation to statutes such as Oregon Revised Statutes 111.070, relative to the rights of inheritance and receipt of payment of foreign inheritances, is covered by In re Estate of Krachler, 199 Or. 448, 263 P. (2d) 769; State Land Board v. Rogers, 219 Or. 233, 347 P. (2d) 57; In re Arbulich's Estate, supra (257 P. (2d) 433), and cases in other jurisdictions cited in these opinions.

As has already been indicated, petitioners' thesis as to the International Monetary Fund Agreement was not clear in its brief on appeal in the Oregon Supreme Court (Resp. Br., Or. Sup. Ct., pp. 72-74). We are unable to find either in that brief or in the Oregon Supreme Court's opinion, rejecting their thesis, the theory of the overriding effect of the Monetary Fund Agreement urged by petitioners in these proceedings for certiorari. This thesis apparently presents the question here in the first instance.

SUMMARY OF ARGUMENT

I

As a general rule treaties, as other written documents and statutes, should be given effect as written in accordance with their terms. Because of the like import and meaning of the language used in Article II of the Serbian treaty as was used in Article IV of the

German treaty, the construction of the German treaty in *Clark v. Allen*, 331 U.S. 503, 91 L. Ed. 1633, is important.

The language "nationals of either High Contracting Party * * * within the territories of the other" used in Article IV of the German treaty is identical in meaning with the language "citizens of the United States in Serbia and Serbian subjects in the United States" used in Article II of the Serbian treaty. The decision in *Clark v. Allen*, supra, holding that the German treaty did not apply to the succession by German nationals to property in the United States of decedents who were American citizens governs the construction of the like language in the Serbian treaty. A historical background of negotiations of the treaty does not serve to alter a long continued judicial construction consistent with the plain language of the treaty, which the treaty-making agencies have not seen fit to change.

II

The application of a treaty in a given case and the construction of treaties are, as other questions of law, the peculiar province of the judiciary. The determination of this Court as to the construction of a treaty is binding on the state courts as well as on the legislative and executive branches of government.

Executive interpretations of a treaty should follow the interpretation of this Court where an applicable treaty construction exists. An executive interpretation of a treaty at variance with an existing applicable treaty construction of this Court must yield to this Court's interpretation.

III

The International Monetary Fund Agreement which permits the parties to the agreement to maintain foreign exchange control laws does not by reason of the fact that the United States is a party constitute an overriding federal policy forbidding Oregon from giving effect to its statute making the right of nonresident aliens to inherit dependent upon the right of American heirs and legatees to receive payment of their inheritances or legacies from the country in which the aliens reside.

Under the Monetary Fund Agreement the parties have recognized that they could impose unlimited monetary controls to regulate *capital* movements. Transfers of inherited funds appear to be *capital* transfers. The mere recognition by one party of the right of the other to impose exchange restrictions does not preclude or disparage the rights of the former. The United States has imposed no exchange restrictions and accordingly has not set up any overriding federal policy one way or the other with regard to capital transfers.

The Oregon statute, ORS 111.070, is a law of succession with respect to decedents' estates. The right to determine succession to a decedents' property is a matter of local law. Similarly, as was held in *Clark v. Allen*, supra (331 U.S. 503, 517), the Oregon statute is not a forbidden extension of state power into the field of foreign affairs which is exclusively reserved to the Federal Government.

ARGUMENT

I

The construction given by this Court in Clark v. Allen, 331 U.S. 503, 91 L. Ed. 1633, to the provision of Article IV of the German Treaty of Friendship, Commerce and Consular Rights of 1923 (44 Stat. 2132), relating to personalty, governs the construction of Article II of the Serbian Treaty of Commerce of 1881 (22 Stat. 963). By reason of language of like meaning in each of the treaties, Article II of the Serbian treaty, similarly as the German treaty, does not cover succession to property of an American citizen in the United States by a Yugoslav national in Yugoslavia.

As a general rule treaties, as other written documents, should be given effect as written in accordance with their terms. *Valentine v. United States*, 290 U.S. 9, 11, 81 L. Ed. 3, 9. The rule is summarized in 87 C.J.S., Treaties, § 13 a, where it is said:

> "If the terms of a treaty are clear and unambiguous the courts must recognize and enforce it as written, notwithstanding the language of the treaty is inconsistent with the correspondence which preceded it; but if the treaty is open to construction the courts should endeavor to ascertain and give effect to the intention of the parties at the time the treaty was made. While various rules have been laid down expressly with respect to the construction of treaties, the courts in seeking to give effect to the intention of the parties usually adopt general rules similar to those which are applicable in the construction of statutes, contracts of individuals, and documents or written instruments generally."

In *Clark v. Allen*, 331 U.S. 503, 91 L. Ed. 1633, this Court had occasion to construe the provision of Article

IV of the Treaty of Friendship, Commerce and Consular Rights of 1923 between the United States and Germany (44 Stat. 2132) relating to personalty with respect to the succession to the personal property of an American citizen dying in the United States by German nationals. Because of the identity in meaning of the language in the German treaty and the Treaty of Commerce between the United States and Serbia of 1881 (22 Stat. 963), which is recognized as continuing in effect with Yugoslavia, the construction of the German treaty in *Clark v. Allen* governs.

In construing the treaty provision of the German treaty in *Clark v. Allen*, supra, this Court referred to the earlier cases involving similar treaty language as *Frederickson v. Louisiana*, 23 How. (U.S.) 445, 16 L. Ed. 577 (Convention between the United States and Wurttemberg, 8 Stat. 588); *Petersen v. Iowa*, 245 U.S. 170 62 L. Ed. 225 (Treaty between the United States and Denmark, 8 Stat. 340, 11 Stat. 719); Duus v. Brown, 245 U.S. 176, 62 L. Ed. 228 (Swedish Treaty, 8 Stat. 60, 232, 346); and *Skarderud v. Tax Commission*, 245 U.S. 633, 62 L. Ed. 522 (Norwegian Treaty, 8 Stat. 60, 346).

In *Clark v. Allen* the petitioner presented an account of the history of the clause not before the Court in *Frederickson v. Louisiana*, supra. However, this Court in its opinion written by Mr. Justice Douglas said (331 U.S. at 515):

> "* * * In case of personalty, the provision governs the right of 'nationals' of either contracting party to dispose of their property within the terri-

tory of the 'other' contracting party; and it is 'such personal property' that the 'heirs, legatees and donees' are entitled to take.

"Petitioner, however, presents a detailed account of the history of the clause which was not before the Court in *Frederickson v. Louisiana*, 23 How (US) 445, 16 L ed 577, supra, and which bears out the construction that it grants the foreign heir the right to succeed to his inheritance or the proceeds thereof.

"But we do not stop to review that history. For the consistent judicial construction of the language since 1860 has given it a character which the treaty-making agencies have not seen fit to alter. And that construction is entirely consistent with the plain language of the treaty. We therefore do not deem it appropriate to change that construction at this late date, even though as an original matter the other view might have much to commend it."

For the purpose of comparison the pertinent provisions of both the German and Serbian treaties are quoted. Article IV of the German treaty relating to personalty reads:

"*Nationals of either High Contracting Party* may have full power to dispose of their personal property of every kind *within the territories of the other*, by testament, donation, or otherwise, and their heirs, legatees and donees, of whatsoever nationality, whether resident or non-resident, shall succeed to such personal property, and may take possession thereof, either by themselves or by others acting for them, and retain or dispose of the same at their pleasure subject to the payment of such duties or charges only as the nationals of the High Contracting Party within whose territories such property may be or belong shall be liable to pay in like cases." (Emphasis supplied.)

Article II of the Serbian [Yugoslav] treaty (22 Stat. 963) reads:

> "In all that concerns the right of acquiring, possessing or disposing of every kind of property, real or personal, *citizens of the United States in Serbia and Serbian subjects in the United States*, shall enjoy the rights which the respective laws grant or shall grant in each of these states to the subjects of the most favored nation.
>
> "*Within these limits*, and under the same conditions as the subjects of the most favored nation, *they* shall be at liberty to acquire and dispose of such property, whether by purchase, sale, donation, exchange, marriage contract, testament, inheritance, or in any other manner whatever, without being subject to any taxes, imposes or charges whatever, other or higher than those which are or shall be levied on natives or on the subjects of the most favored state.
>
> "*They* shall likewise be at liberty to export freely the proceeds of the sale of their property, and their goods in general, without being subjected to pay any other or higher duties than those payable under similar circumstances by natives or by the subjects of the most favored state." (Emphasis supplied)

The language "Nationals of either High Contracting Party * * * within the territories of the other" used in the German treaty is but a paraphrase of the terms "citizens of the United States in Serbia and Serbian subjects in the United States" found in the Serbian treaty of 1881, continuing in effect as to Yugoslavia.

In both *In re Arbulich's Estate*, 41 Cal. (2d) 86, 257 P. (2d) 433, and *Lukich v. Department of Labor and Industries*, 176 Wash. 221, 29 P. 22d) 388, the language "citizens of the United States in Serbia and Serbian sub-

jects in the United States" was interpreted as meaning the *nationals* of the contracting nations *within the territorial limits* of the other.

The word "national" (used in Article IV of the German treaty) has been defined as "A word commonly used in diplomatic language and in treaties to indicate a citizen or subject of a given country." 3 Bouvier's Law Dictionary (Rawle's Third Revision). In this sense the language "citizens of the United States in Serbia and Serbian subjects in the United States" used in the American-Serbian treaty and "Nationals of either High Contracting Party * * * within the territories of the other" in the German treaty considered in *Clark v. Allen*, supra (331 U.S. 503), are indistinguishable in meaning.

The above emphasized language of the Yugoslavian treaty specifically designates and limits the class of persons to whom the treaty applies: It covers both *disposition and acquisition* of property by a citizen of the United States who may be in Yugoslavia or a citizen of Yugoslavia who may be in the United States, but it does not apply to nationals of either country within their own territory. The second paragraph of Article II is carefully introduced by the qualifying words "*Within these limits.*" The word "*they*" in the second and third paragraphs of Article II can have no other antecedent than the words "citizens of the United States in Serbia and Serbian subjects in the United States." Only "*within these limits*" may *they* (citizens of the United States in Serbia [Yugoslavia] and Serbian [Yugoslavian] sub-

jects in the United States) enjoy the privileges of the most favored nation.

Petitioners concede that the Clark case decided that the German Treaty of 1923 "did not apply to the succession by German nationals to personal property in the United States of decedents who were American nationals" (Pet. Br. 9). The Clark decision took into consideration the whereabouts of both the decedent and her heirs. In analyzing *Frederickson v. Louisiana*, 23 How. (US) 445, 16 L. Ed. 577, the opinion in the Clark case points out that the testator was a citizen of the United States, domiciled in Louisiana, and that the legatees were citizens and residents of Wurttemberg, not domiciled in the United States. *Clark v. Allen*, supra (331 US at 515). In its holding as to the application of the German treaty to the facts in the Clark case, the opinion determine that the treaty provision "does not cover personalty *located in this country* and which an *American citizen* undertakes to leave to *German nationals*." *Clark v. Allen*, supra (331 U.S. 503, 516).

Upon finding that the language in Article II of the Serbian treaty had the same import and meaning as that in Article IV of the German treaty, the Oregon court followed the pattern of interpretation in the Clark case and held, in effect, that Article II of the Serbian treaty did not cover succession by Yugoslavian nationals to property in Oregon of decedents who were American citizens.

The language of a treaty must be read in context and in relation to the treaty as a whole. If the nego-

tiators intended to restrict the rights granted by the provisions to the nationals of one country in the territory of the other, it is difficult to think of more apt language better suited to accomplish precisely that purpose.

The language "citizens of the United States in Serbia and Serbian subjects in the United States" is not unique to Article II but is also found in other provisions of the Serbian treaty.

Article I reads:

"There shall be reciprocally full and entire liberty of commerce and navigation between the citizens and subjects of the two high contracting powers, *who shall be at liberty to establish themselves freely in each other's territory.*

"*Citizens of the United States in Serbia and Serbian subjects in the United States* shall reciprocally, on conforming to the laws of the country, be at liberty freely to enter, travel or reside in any part of the respective territories, to carry on their business, and shall enjoy in this respect for their persons and property the same protection as that enjoyed by natives or by the subjects of the most favored nation.

* * *

"In like manner in all that relates to local taxes, customs, formalities, brokerage, patterns or samples introduced by commercial travellers, and all other matters connected with trade, *citizens of the United States in Serbia and Serbian subjects in the United States* shall enjoy the treatment of the most favored nation, and all the rights, privileges, exemptions and immunities of any kind enjoyed with respect to commerce and industry by the citizens or subjects of the high contracting parties, or which are or may be hereafter conceded to the subjects of any third power, shall be extended to the citizens or subjects of the other." (Emphasis supplied.)

Again, Article IV reads:

> "*Citizens of the United States in Serbia and Serbian subjects in the United States* shall be reciprocally exempted from all personal service, whether in the army by land or by sea; whether in the national guard or militia; from billeting; from all contributions, whether pecuniary or in kind, destined as a compensation for personal service; from all forced loans, and from all military exactions or requisitions. The liabilities, however, arising out of the possession of real property, and for military loans and requisitions to which all the natives might be called upon to contribute as proprietors of real property or as farmers, shall be excepted.
>
> "*They* shall be equally exempted from all obligatory official, judicial, administrative or municipal functions whatever."

* * *

Other articles of the treaty are not so qualified, and presumably under them broad privileges may, no doubt, be enjoyed.

Language similar to the terms "citizens of the United States in Serbia and Serbian subjects in the United States" appears in the treaty between Roumania and the United States of 1881, approved by Congress but apparently never concluded with Roumania, and also in the treaties between Serbia and Great Britain, and Roumania and Great Britain, also negotiated about that time.

An interesting historical background is presented in the brief of the United States as amicus curiae as to documents and correspondence of Edward Schuyler and John A. Kasson who negotiated the Roumanian and Serbian treaties with the United States. (The brief of the United States advises this documentary material has

been deposited with the Clerk of the United States Supreme Court.) The clarity of language used by Schuyler and Kasson in this correspondence again buttresses the conclusion that the language in qusetion in the Serbian treaty is not stilted English, but purposefully chosen to convey a particular meaning.

From this documentary material it appears that the treaties which Roumania and Serbia had negotiated or concluded with other countries, and particularly the Roumanian and Serbian treaties with Great Britain, served as models for the treaties of Roumania and Serbia with the United States. See Schuyler's dispatches to the Secretary of State, dated November 29, 1880, and January 4, 1881, and copies of treaties between Roumania and Great Britain concluded April 5, 1880, and Serbia and Great Britain concluded January 30, 1880. In these treaties language similar to that here under consideration in the Serbian treaty with the United States also appears and evidences a particular intent.

As already mentioned, historical material of this kind was furnished in *Clark v. Allen*, supra (331 U.S. 503, 515, 516). Declining a review of that history, the opinion pointed out that a consistent judicial construction had given the language a fixed character which treaty-making agencies had not seen fit to change, and, since that construction was consistent with the plain language of the treaty, the Court would not change it.

Treaties are the subject of careful consideration before they are entered into and are drawn by persons competent to choose apt words to express their mean-

ing: *Rocca v. Thompson*, 223 U.S. 317, 332. As shown by the cases cited supra in this brief, a distinction in treaties between citizens and noncitizens within a country is normal and not uncommon. A "most favored nation" clause is limited to such matters as are within the subject matter of the particular treaty in which it is contained. *Lukich v. Department of Labor and Industries*, 176 Wash. 221, 29 P. (2d) 388, 390.

In the Lukich case the Washington court commented upon the construction of the Yugoslavian treaty in relation to the most favored nation clause as follows (29 P. (2d) 388 at p. 389):

> "The question here presented turns upon the construction to be given to the convention between the two countries. It is important to note that article 1 of the convention contains the '*most favored nation*' clause, which provision is well known in international law, and occurs in many treaties which concern the rights of nationals of the respective high contracting parties while residing in the territory of the other. *Generally speaking, the effect of this clause is to grant to the nationals of the contracting parties, while within the territorial limits of the other*, all rights, privileges, and immunities, which in the past have been granted by the treaty or which may in the future be so granted to the nationals of other nations along the same lines covered in the treaty in question. * * *" (Emphasis supplied)

The second paragraph of Article II of the Serbian treaty carefully limits the clause by the restrictive words "Within these limits." This phrase confines and qualifies the terms of the "most favored nation" clause.

As was said in *Valentine v. United States*, 299 U.S. 5, 11, 81 L. Ed. 3, 9:

> "Examining the treaty in that aspect [discretion of the Executive on extradition], it is our duty to interpret it according to its terms. These must be fairly construed, but we cannot add to or detract from them."

Since the language defining the class to whom Article II of the Yugoslavian treaty and Article IV of the German treaty apply is identical in meaning, the interpretation of the German treaty in *Clark v. Allen*, supra, governs the interpretation of Article II of the Yugoslavian treaty.

II

The application of a treaty and its construction are the peculiar province of the judiciary and not matters of executive or legislative determination.

The question whether a treaty of the United States is to be construed by the executive branch of government or otherwise has long since been answered by this Court. In *Jones v. Meehan*, 175 U.S. 1, 32, 44 L. Ed. 49, 62, this Court said:

> "* * * The construction of treaties is the *peculiar province of the judiciary;* and, except in cases purely political, Congress has no constitutional power to settle the rights under a treaty, or to affect titles already granted by the treaty itself. *Wilson v. Wall*, 6 Wall. 83, 89, 18 L. ed. 727, 729; *Reichart v. Felps*, 6 Wall. 160, 18 L. ed. 849; *Smith v. Stevens*, 10 Wall. 321, 327, 19 L. ed. 933, 935; *Holden v. Joy*, 17 Wall. 211, 247, 21 L. ed. 523, 535." (Emphasis supplied)

The application of a treaty to a given case and its construction are, as any other law, questions for the courts: *Hamilton v. Erie R.R. Co.*, 219 N.Y. 343, 114 N.E. 399, 402.

This principle in relation to the interpretation of a treaty by the State Department and a representative of a foreign country is expounded by Secretary of State Knox upon the request of the Mexican Government for an exchange of notes interpreting a provision of the extradition treaty (V Hackworth, Digest of International Law, 399), as follows:

> "The department regrets to say that it deems it inadvisable to exchange notes in the sense proposed in your note, since even if the department did exchange notes setting forth an understanding as suggested by you, such notes would not, so far as the internal affairs of this Government are concerned, have the status either of a treaty or of a law, but would be merely an executive interpretation of the treaty and of the Federal statutes. This would not be binding upon the courts of this country, which might at any time disregard the agreement incorporated in the notes, in which case it would not be possible for the department to control their decision. * * *"

The note of the State Department of April 24, 1958, interpreting Article II of the Yugoslavian treaty, (Pet. Br. 29-31 and App D, p. 7a) is at variance with the interpretation of this Court of similar language in the German treaty considered in *Clark v. Allen*, supra (331 U.S. 503). However, the note itself concludes by recognizing that it "is not to be considered as having

the character of an international agreement or as effecting any modification of the treaty."

Whether the construction placed upon the treaty by the executive branch of government or a foreign country is binding is aptly discussed in Ex parte Charlton, 185 F. 880, 886 (aff'd. in 299 U.S. 447), in which it was said:

> "* * * Undoubtedly, in view that treaties are made a part of the supreme law of the land by the Constitution which authorizes them, the courts are bound to construe such treaties as they are bound to construe any other law of the land when properly presented for interpretation, and, while the courts will give due consideration to the construction placed upon a treaty by the executive or diplomatic branches of the government, yet upon the courts is placed the duty of acting independently, and to accept full responsibility in determining the construction that is to be given to the treaties. And further, inasmuch as the treaty is by the Constitution made a law of the land, the construction placed upon some of its provisions by the departments of the foreign country with whom the treaty is made, executive, legislative, or judicial, is not controlling. The fact that our courts' interpretation of the true meaning of such provisions may not be acquiesced in by the foreign government is of no consequence when the question is one of enforcing such treaty provisions in this country, and over a person who is within its jurisdiction."

Like any other law or contract, a treaty must be construed according to its terms. Language contained in a treaty cannot be rejected as surplusage nor can it be said to have been inserted carelessly or inadvisedly. *Foster v. Neilson*, 2 Pet. (U.S.) 253, 308-309. The language of Article II of the Yugoslavian treaty becomes

"stilted" only when the construction urged by petitioners is attempted to be applied.

III

The International Monetary Fund Agreement which permits parties to the agreement to maintain foreign exchange control laws does not by reason of the fact that the United States is a party to the Agreement constitute an overriding federal policy forbidding the State of Oregon from giving effect to its statute making the right of nonresident aliens to inherit dependent upon the right of American heirs and legatees to receive payment of their inheritances or legacies from the country in which the aliens reside.

It is recognized that the International Monetary Fund Agreement permits the member nations to maintain foreign exchange control laws restricting international exchange transactions within the framework of the agreement. It is not the purpose of the Fund, however, to encourage such monetary restrictions, but rather its policy has been one of toleration, the object of the Fund being to secure withdrawal of exchange restrictions as soon as possible. This policy is expressed in the Annual Report of the Monetary Fund, 1954, page 78, where it is said:

> "The Fund has made a careful examination of the restrictive system of each member country which still avails itself of the protection of Article XIV. Where the Fund has raised no objection to the maintenance of existing restrictions, its view that restrictive practices should be of a temporary character and its intention to pursue the matter further in later consultations have been noted. In such cases the Fund has

urged serious consideration of measures that would facilitate the elimination of the restrictive practices. * * *"

While § 1(a) of Article VI of the Agreement (R. 58-59) relating to capital transfers provides that a member may not make "*net use*" of the Fund's resources to meet a large or sustained outflow of capital and that the member may, in such event, be requested by the Fund to impose controls, § 1(b) of this Article states that nothing in the Section should be deemed:

"(i) to prevent the use of the resources of the Fund for capital transactions of reasonable amount required for the expansion of exports or in the ordinary course of trade, banking or other business, or

"(ii) to effect capital movements which are met out of a member's own resources of gold and foreign exchange, but members undertake that such capital movements will be in accordance with the purposes of the Fund."

Section 3 of Article VI, as pertinent, provides (R. 59):

"Members may exercise such controls as are necessary to *regulate international capital movements*, but no member may *exercise these controls* in a manner which will restrict payments for *current* transactions * * *" (Emphasis supplied.)

Petitioners' brief, pp. 44-45, refers to Article VIII of the Agreement (R. 60) and sets forth the interpretation of the Executive Directors as to § 2 (b) relating to exchange contracts. It appears, however, Article VIII, § 2, relates to *current* payments rather than *capital* trans-

fers, and, accordingly, the interpretation does not appear to be applicable.

Petitioners' brief, pp. 41-42, recognizes that inheritances are "capital" and that the transfer of inherited funds are "capital transfers" over which the members of the Fund are permitted to exercise controls. The United States in its brief as amicus curiae, p. 32, upon reviewing the provisions of the Monetary Fund Agreement, points out that both the United States and Yugoslavia as signatories to the Agreement recognized "that either or both could impose unlimited monetary controls to regulate capital movements." The Annual Report of the International Monetary Fund, 1947, p. 33, confirms the right of members to control capital movements, stating:

> "Control of capital movements is permitted to Fund members at all times."

Accordingly, if transfers of inherited funds are "capital transfers" or "capital movements," then both the United States and Yugoslavia are free to control capital transfers or not as they choose.

Recognition by the parties to the Agreement of the right of a member to exercise exchange controls, however, does not operate to affect or curtail the rights of other members in this area. In this respect the United States by becoming a party to the Agreement sets up no overriding federal policy one way or the other with regard to capital transfers, and the situation remains the same as to state statutes concerning the rights of inherit-

ance from its citizens as it was when *Clark v. Allen*, supra (331 U.S. 503), was decided.

Petitioners' brief, p. 49, cites the provision in Article II, 1(c), of the Economic Cooperation Agreement of 1952 between the United States and Yugoslavia, T.I.A.S. 2384, and that in Title 22 U.S.C. § 1513 (b) (2) providing for the taking of steps and endeavors by the recipient country to stabilize its currency, etc., with the suggestion that such requirements include the regulation of foreign exchange transactions.

However, the International Monetary Fund Reports have consistently stressed as objectives the elimination of exchange restrictions and the restoration of free convertibility of currencies. In its Report entitled "The First 10 Years of the International Monetary Fund," August 24, 1956, p. 5, it is said:

> "No doubt, countries can gain temporary advantages at certain times by the use of restrictive and discriminatory measures which enable them to achieve a forced balance in their international payments. These advantages are quickly wiped out if other countries also impose restrictive and discriminatory measures. If many countries resort to such policies, they will, of course, ultimately balance their international payments, but at a level of trade so low that their own well-being and that of their trading partners will be impaired. On the other hand, policies directed toward the achievement of international balance through expansion of world trade will contribute to the growth in real income throughout the world."

In the Annual Report of the International Monetary Fund for 1952, p. 61, there was stated:

> "As the period during which restrictions are applied is prolonged, the disadvantages resulting from their widespread application tend to increase, while their advantages tend to diminish."

In the Annual Report of the Fund for 1960, p. 122, the Report expressed gratification that the year 1959 "was particularly satisfactory in the lessening of exchange restrictions * * *."

Accordingly, it would seem, as indicated by the policy of the Fund, that while under the Economic Cooperation Agreement and Title 22 U.S.C. § 1513 (b) (2) exchange restrictions are permitted they are not necessarily required.

Mention has also been made in the briefs of the Pecuniary Claims Agreement of 1948 between the United States and Yugoslavia (62 Stat. 2658; T.I.A.S. 1803; R. 52-53); however, the agreement does not preclude operation of foreign exchange laws but rather, in Article 11, indicates restrictions as to capital transfers are applicable.

Article 11 provides:

> "The Government of Yugoslavia agrees to give sympathetic consideration to applications for transfers to the United States of deposits in banks of Yugoslavia and other similar forms of capital owned by nationals of the United States, where the amounts involved are small but which, in view of the circumstances, are of substantial importance to the persons requesting the transfers."

The Oregon statute, ORS 111.070, supra, before this Court is not an exchange control regulation nor an entry by the state into the field of foreign affairs. The Oregon statute is a law of succession of this state as was § 259 of the California Probate Code considered in *Clark v Allen,* supra (331 U.S. 503, 517). See *In re Estate of Krachler,* supra (199 Or. 448, 454, 263 P. (2d) 769, 772); *In re Knutzen's Estate,* 41 Cal. (2d) 573, 191 P. (2d) 747, 751. The right to determine the succession to a decedant's property is a matter of local law. *Clark v. Allen,* supra; *Mager v. Grima,* 8 How. (U.S.) 490, 12 L. Ed 1168. In the absence of an overriding federal policy, the state statute prevails.

In *Clark v. Allen,* supra (331 U.S. 503, 517), the California statute similar to the Oregon statute was challenged as an extension of state power into the field of foreign affairs which was exclusively reserved to the Federal Government. This Court rejected the contention, pointing out that California had not entered the domain of negotiating with a foreign country or making a compact with it. The same is equally true with regard to the Oregon statute.

CONCLUSION

In conclusion, it is respectfully submitted that the decision of the Oregon Supreme Court was correct and should therefore be affirmed.

Respectfully submitted,

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APPENDIX A

OREGON REVISED STATUTES 111.070

"(1) The right of an alien not residing within the United States or its territories to take either real or personal property or the proceeds thereof in this state by succession or testamentary disposition, upon the same terms and conditions as inhabitants and citizens of the United States, is dependent in each case:

"(a) Upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property and the proceeds thereof upon the same terms and conditions as inhabitants and citizens of the country of which such alien is an inhabitant or citizen;

"(b) Upon the rights of citizens of the United States to receive by payment to them within the United States or its territories money originating from the estates of persons dying within such foreign country; and

"(c) Upon proof that such foreign heirs, distributees, devisees or legatees may receive the benefit, use or control of money or property from estates of persons dying in this state without confiscation, in whole or in part, by the governments of such foreign countries.

"(2) The burden is upon such nonresident alien to establish the fact of existence of the reciprocal rights set forth in subsection (1) of this section.

"(3) If such reciprocal rights are not found to exist and if no heir, devisee or legatee other than such alien is found eligible to take such property, the property shall be disposed of as escheated property."

APPENDIX B

Treaty of Commerce Between the United States of America and Serbia, concluded October, 1881

Article II

"In all that concerns the right of acquiring, possessing, or disposing of every kind of property, real or personal, citizens of the United States in Serbia and Serbian subjects in the United States, shall enjoy the rights which the respective laws grant or shall grant in each of these states to the subjects of the most favored nation.

"Within these limits, and under the same conditions as the subjects of the most favored nation, they shall be at liberty to acquire and dispose of such property, whether by purchase, sale, donation, exchange, marriage contract, testament, inheritance, or in any other manner whatever, without being subject to any taxes, imposts or charges whatever, other or higher than those which are or shall be levied on natives or on the subjects of the most favored state.

"They shall likewise be at liberty to export freely the proceeds of the sale of their property, and their goods in general, without being subjected to pay any other or higher duties than those payable under similar circumstances by natives or by the subjects of the most favored state."